LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 20 1967
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 397

LESLY COHEN,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

RICHARD H. FOSTER,
1102 Central Tower,
San Francisco, California 94103,
Counsel for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Citations to opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	4
Conclusion	7

Table of Authorities Cited

Cases	Pages
American Schools v. McNulty, 187 U.S. 921	6
Armstrong v. United States, 327 F.2d 189 (9th Cir. 1964)	5
Baker v. United States, 310 F.2d 924 (9th Cir. 1962)	5
Bateman v. United States, 212 F.2d 61 (9th Cir. 1954)	5
Ex parte Jackson, 96 U.S. 727	6
Hoffa v. U.S., 35 L.W. 4058	6
Lamont v. Post Master General, 381 U.S. 301	5, 6
Legatos v. United States, 222 F.2d 678 (9th Cir. 1955)	5
Mann v. United States, 319 F.2d 404 (5th Cir. 1963)	5
Sherwin v. U.S., 320 F.2d 137 (9th Cir. 1963)	4, 5
Turf Center Inc. v. United States, 325 F.2d 793 (9th Cir. 1963)	5
United States v. Barash, 365 F.2d 395 (2d Cir. 1966)	4, 5
U.S. v. Cohen, 241 F.Supp. 269	2
United States v. Denton, 336 F.2d 785 (6th Cir. 1964)	4, 5
U.S. v. Halseth, 342 U.S. 247	6
United States v. Releford, 352 F.2d 36 (6th Cir. 1965)	4, 5
Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953)	5

Statutes	
18 USC 1084	2
28 USC 1254	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No.

LESLY COHEN,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner Lesly Cohen, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on May 5, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court on the question of granting an evidentiary hearing is reported in

U.S. v. Cohen, 241 F.Supp. 269. The opinion of the Court of Appeals printed in the Appendix is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 5, 1967, rehearing was denied on June 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Is an instruction in a specific intent a criminal offense that a person ordinarily intends the natural consequences of his acts prejudicial error?

2. Is an evidentiary hearing on a motion to suppress necessary where the Government by affidavit denies misconduct?

STATUTE INVOLVED

The statutory provision involved is § 1084 of Title 18, United States Code. It is printed in the Appendix.

STATEMENT

Petitioner was convicted of using an interstate telephone facility for the transmission of wagering information and wagers in violation of § 1084 of Title 18, United States Code. His conviction ultimately rested

on the testimony of one witness, a friend of 35 years standing who while a resident of San Francisco was a frequent visitor to Las Vegas, the place where petitioner resided and to which the prohibited calls were made. The evidence on the question of the petitioner's knowledge of the interstate character of the call was practically non-existent and in this connection it is urged that the instruction on intent of the Court was prejudicial. Prior to the trial of this case a motion to suppress was filed based on interference with petitioner's mail in the course of the investigation. The Government did not deny using a so-called "pen recorder" that is a device that records phone numbers or deny the use of a concealed microphone in the phone booth. It is requested that the Solicitor General inform the Court as to whether or not any device was utilized in connection with this case which would have allowed the Government to record either the phone numbers or phone conversations of the petitioner. Since no opportunity was given to this petitioner to examine under oath or otherwise the persons who were familiar with the mail and telephone surveillance of the petitioner we must rely on the generosity of the Department of Justice to supply this information. Despite specific allegations of misconduct on the part of the Government couched in terms of the statutes forbidding interference with the mail and wiretapping and an admission by the Government by way of affidavit that petitioner's mail was in fact examined, an evidentiary hearing on the question of wiretapping and mail tampering was denied by the Court. Petitioner was convicted on two out of the nine counts

charged and acquitted by the jury on the remainder. The Court of Appeals affirmed the Judgment.

REASONS FOR GRANTING THE WRIT

1. The trial Court gave the following instruction:

> "As a general rule, it is reasonable to infer that a person ordinarily intends all the natural consequences of acts knowingly done or knowingly omitted. So unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing under like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

The Court of Appeals, while criticizing this instruction, in accord with the practice in the Ninth Circuit concluded that it was not prejudicial. See *Sherwin v. U.S.*, 320 F.2d 137, 151 (9th Cir. 1963). This instruction has formed the subject of critical comment by a number of Circuit Courts, it however continues to be presented by the Government and used. There is a conflict in the Circuit as to whether this instruction in a case requiring specific intent is reversible error. The following Circuits are among those holding the instruction reversible and in many cases plain error: *United States v. Barash,* 365 F.2d 395, 402-03 (2d Cir. 1966); *United States v. Releford,* 352 F.2d 36, 40 (6th Cir. 1965); *United States v. Denton,* 336 F.2d 785, 788

(6th Cir. 1964); *Mann v. United States,* 319 F.2d 404, 409 (5th Cir. 1963); *Wardlaw v. United States,* 203 F.2d 884, 887 (5th Cir. 1953).

In the following cases this instruction has not been held to be prejudicial: *Sherwin v. United States,* 320 F.2d 137, 151 (9th Cir. 1963). See also *United States v. Releford,* 352 F.2d 36, 40 (6th Cir. 1965); *United States v. Denton,* 336 F.2d 785, 788 (6th Cir. 1964); *Armstrong v. United States,* 327 F.2d 189, 195 (9th Cir. 1964); *Turf Center Inc. v. United States,* 325 F. 2d 793, 797 n. 5 (9th Cir. 1963); *Baker v. United States,* 310 F.2d 924, 931 (9th Cir. 1962); *Legatos v. United States,* 222 F.2d 678, 687 (9th Cir. 1955); *Bateman v. United States,* 212 F.2d 61, 69-70 (9th Cir. 1954). Other such cases are collected in *Barash,* supra, 365 F.2d at 402.

In the instant case the evidence on the question of knowledge of the interstate character of the call was so thin as to be almost non-existent. If ever this instruction was prejudicial it would be so in the circumstances of this case. The Supreme Court has never passed on the propriety of this instruction and we believe a statement of its views would finally lay the matter to rest. Unless an authoritative statement is made the Government apparently still intends to press District Courts to utilize the instruction hoping that even if used they will not in a hard case risk reversal.

2. In our opinion the practice, admitted by affidavit by the Government, of examining first class mail is directly contrary to the principal announced in the recent decision of *Lamont v. Post Master General,*

381 U.S. 301. In the event the Government desires to inspect mail the normal procedure of a search warrant is available to them. Tampering with mail in the manner admitted by the Government, we believe, has been disapproved in principal by this Court in *Ex parte Jackson,* 96 U.S. 727; *American Schools v. McNulty,* 187 U.S. 921; and *U.S. v. Halseth,* 342 U.S. 247.

However, even assuming that some examination of mail is Constitutionally permitted or permitted under the statutes, we believe that the allegations of the motion including an allegation that the mail was actually opened or otherwise examined by the Government and the allegation that wiretapping was involved required an evidentiary hearing. We believe well settled principles established by this Court require that where as here there is an indication that the Government has invaded the privacy of a defendant by prohibited means the defendant should be allowed an opportunity to examine, under oath, the persons who actually conducted the investigation. The most recent case establishing that principle was *Hoffa v. U.S.,* 35 L.W. 4058, and there as here the Government denied with respect to that defendant any specific misconduct while admitting some of the allegations were true. We believe the applicable decisions of this Court require an evidentiary hearing where the assertions of the Government are subject to cross examination. We believe the requirement imposed by the Court of Appeals that there must be a preliminary trial by affidavit is contrary to proper judicial administration

and whereas here the evidence to prove petitioner's assertions is in possession of the Government and not amenable by discovery proceedings from the Government a deprivation of due process of law. If this decision is allowed to stand judicial inquiry can be foreclosed by a bland denial not subject to the truth finding process of judicial inquiry.

CONCLUSION

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Dated, San Francisco, California,
July 17, 1967.

Respectfully submitted,
RICHARD H. FOSTER,
Counsel for Petitioner.

(Appendices Follow)